

11/20



The Comptroller General
of the United States

Washington, D.C. 20548

Decision

Matter of: Oxford Project, Inc.

File: B-228461, B-228461.2

Date: February 17, 1988

DIGEST

1. Agency is not required to make parallel awards of single line item--that is, awards to two different offerors for parts of the line item--where the low offeror has offered to furnish the entire line-item quantity.
2. Where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the later-raised allegations must independently satisfy the General Accounting Office timeliness requirements.
3. General Accounting Office will not object to agency's position that, for purposes of applying the stay provisions of the Competition in Contracting Act of 1984, post-award ratification of a contract issued without required approval renders a pre-ratification protest a protest after award, since the protester is ineligible for award in any event.

DECISION

Oxford Project, Inc., protests the Department of Justice's award of a contract to Manhattan House C.T.C., Inc., under request for proposals (RFP) No. 100-117-7-NE issued by the Federal Bureau of Prisons for residential halfway house services. The protester contends that a single aggregate award of the sole line item is improper because the RFP permitted parallel awards, and that parallel awards are in the best interest of the government, since Oxford Project allegedly offered a lower price for less than the total requirement. The protester further urges that Manhattan's proposal was evaluated improperly. Finally, the protester contends that Justice improperly failed to stay Manhattan House's performance of the contract as required by the Competition in Contracting Act of 1984 (CICA).

We deny the protest in part and dismiss it in part.

041313

Under the solicitation's evaluation scheme, technical considerations were worth 120 points, and price was worth 20 points. The RFP had a single line item, with four blanks in which offerors were directed to insert four fixed prices to cover the provision of services to an estimated 120 federal prisoners (also referred to as providing 120 beds) during a base period of 1 month in fiscal year 1987, and three 1-year option periods.^{1/} The previous solicitation for the requirement differed from the current RFP by (1) splitting the 120-bed requirement into two sub-line items (60 beds for the Southern District of New York and 60 beds for the Eastern District), (2) expressly allowing offerors to bid less than the aggregate requirement, and (3) expressly contemplating the possibility of either aggregate or multiple awards. Under the prior solicitation, the protester received an award for 50 beds in the Eastern District with payment determined on a sliding scale per diem rate, based on the average number of beds occupied in the 50-bed facility each month.

Both the awardee and the protester initially assumed that Justice would make parallel awards of the single line item's base period requirement and that the ratio of beds per awardee established for the base period would continue into the option periods; however, the awardee's proposal stated that the firm could provide the entire 120-bed requirement at a single site in the Southern Judicial District. The awardee offered a firm fixed price of \$33.96 per manday.

The protester offered to provide 50 beds, but instead of offering a fixed rate for the base and option periods it offered a fee schedule with sliding scale payments based on the number of beds actually occupied, ranging from a low of \$32.93 for 50 beds to a high of \$41.16 for 40 or less beds. Justice questioned the protester concerning its offer of less than the required 120 beds, and its use of sliding scale pricing instead of the required fixed price per manday. The protester responded that its offer was limited to 50 beds because its facility could only accommodate that many individuals, and stated with regard to the sliding scale:

"We have operated with this type of contract in the past, and would prefer to do so in the

^{1/} The RFP estimated the requirement for each time frame in terms of mandays; thus, the approximately 1-month base period at the end of fiscal year 1987 was an estimated 3,650 mandays (120 beds X 30.42 days) and each of the 1-year options was an estimated 43,800 mandays (120 beds X 365 days).

future. However, if we must accept a firm, fixed-price contract, we are offering a rate of \$41.16 per client, per day."

The agency's evaluators found the proposals submitted by Oxford Project and Manhattan House essentially equal with respect to technical factors. The source selection official proceeded to make two award recommendations: on July 28 he recommended an 80/40 bed split between Manhattan House and Oxford Project, and on September 3 he recommended award of the entire 120-bed requirement to Manhattan House with a second award of 40 beds to the protester to meet a possible overflow. In mid-September, without obtaining necessary preaward approvals, the contracting officer acted on the second award recommendation by mailing separate Standard Form 26 contract award forms to both Manhattan House (for 120 beds) and the protester (for 40 beds). Manhattan House returned its form on September 16 and the next day was awarded a 120-bed contract with the performance period commencing November 1.

On September 23, following discussions with agency legal and procurement officials, the source selection official's deputy made a third award recommendation, overruling the second recommendation. The third recommendation called for a single 120-bed award to Manhattan House and no award to the protester. The agency reports that this recommendation was based on the conclusion that Manhattan House was the only offeror willing and able to meet the entire 120-bed requirement for a fixed price and was the low offeror.

On September 24, the protester returned its signed Standard Form 26 to the government.^{2/} On September 29 the agency sent the protester notice of the single award to Manhattan House and on October 8 the Oxford Project filed its protest with our Office. Justice then discovered the contracting officer's failure to obtain the required approvals before making the award and, on October 23, the Director of the Bureau of Prisons ratified the contract as signed.

We find no merit in Oxford Project's contention that it was improper for Justice to award the entire line item to Manhattan House. Generally, multiple awards are permissible if the method of award clause in the solicitation does not

^{2/} While the protester argues that it received a valid award for a 40-bed contract, the document never was signed by the contracting officer and therefore the protester's offer never was accepted by the government. See American Management Co., B-228279, et al., Jan. 15, 1988, 88-1 CPD ¶ ____.

specifically require an aggregate award. See Talbott Development Corp., B-220641, Feb. 11, 1986, 86-1 CPD ¶ 152. A parallel award is a form of multiple award where an individual line item is split between the low offer for that item and the second low offer. Parallel awards are permissible in certain circumstances, for example, when no one offeror is a responsible source for the entire quantity required by the line item. See Stic-Adhesive Products Co., Inc., B-227162, Sept. 25, 1987, 66 Comp. Gen. ___, 87-2 CPD ¶ 300.

Here, the agency advises that there is no operational justification for parallel awards. Although there may have been some question in the agency regarding this position, it was resolved finally when the head of the contracting activity ratified the single award to Manhattan House instead of reopening discussions for the purpose of splitting the award.

Further, we do not accept the protester's argument that the benefits of its lower sliding scale fixed price for a portion of the line item justifies a parallel award, because the sliding scale does not constitute a fixed price that can be compared with the awardee's fixed price. A firm, fixed-price contract is one that provides for a price that is not subject to any adjustment on the basis of the contractor's cost experience in performing the contract. Federal Acquisition Regulation (FAR) § 16.202-1 (FAC 84-5). Obviously, Oxford Project's attempt to protect itself against the cost impact on any monthly fluctuation of inmate population by price adjustment through sliding scale pricing precludes the conclusion that it offered a firm, fixed price. Since the protester's actual offered fixed price for the maximum number of beds it can provide--50--was \$41.16 per manday, and the awardee's was \$33.96 per manday, the award of parallel contracts clearly was not appropriate.

Moreover, the fact that the agency previously made parallel awards not contemplated by the current RFP in some other procurement does not justify a proposal offering less than what the current RFP requires, because each procurement must stand upon its own proprieties. See Discount Machinery & Equipment, Inc., B-223547, Aug. 29, 1986, 86-2 CPD ¶ 242.

The protester urges in its December 9 comments on the agency report and the bid protest conference that the award to Manhattan House was improper because the contract awarded deviated substantially from the solicitation in a number of respects. Those include the fact that the base period awarded differed from the period solicited (as stated above, performance began November 1, 1987, where as the RFP base period was for 1 month in fiscal year 1987), and that the

contract period spanned fiscal years. The protester should have been aware of these issues by September 24, when the protester returned its signed Standard Form 26 for the 40 beds to the government, since its argument is based on the assumption that its Standard Form 26 contains exactly the same provisions as the awardee's Standard Form 26.

Assuming that Oxford Project is an interested party to raise these matters, on the theory that if the argument were sustained we would recommend that the agency terminate the contract and resolicit the requirement, we nevertheless will not consider them because they are untimely raised. Our Bid Protest Regulations require that a protest based on other than alleged solicitation improprieties be filed not later than 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1987). Further, where a protester initially files a timely protest and later supplements it with new and independent grounds of protest, the later-raised allegations must independently satisfy these timeliness requirements. Arndt & Arndt, B-223473, Sept. 16, 1986, 86-2 CPD ¶ 307. Oxford Project did not raise these issues with our Office until December 9, more than 10 working days after it knew the new bases for protest.

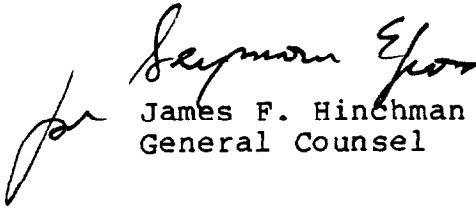
Finally, Oxford Project contends that Justice improperly failed to withhold award of the contract as required by CICA, 31 U.S.C. § 3553(c)(1) (Supp. III 1985), where a protest is filed before award. The protester argues that because the contracting officer lacked authority to make an award without first obtaining necessary higher-level approvals, and such approvals were only obtained in late October, it follows that when the protest was filed on October 8 there was no valid contract award and a stay should have been implemented.

Justice takes the position that the instant protest is best regarded as a protest after award because the October 23 ratification can be deemed legally to relate back and give effect to the contracting officer's actions in awarding the contract on September 17 as if the award had been originally authorized. On that basis, the CICA provision applicable to postaward protests, 31 U.S.C. § 3553(d)(1), would apply, which permits continued performance where the protest is filed more than 10 days after award. Justice further reports that award and/or performance would have been authorized because of the agency's urgent need for the services as a result of an unprecedented increase in the federal prison inmate population.

We see no reason to decide which of the CICA's two stay provisions was applicable here. The protester was

ineligible for award from the outset, and thus could not have been prejudiced by the continuation of contract performance.

The protest is denied in part and dismissed in part.

James F. Hinchman
General Counsel